IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1316

2,606.84 ACRES OF LAND IN TARRANT COUNTY, TEXAS, AND FRANK CORN, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITIONERS' REPLY

The Brief for the United States in Opposition has been fully answered by the Petition except in one respect. The Government relies on the Act of December 22, 1944, c. 665, § 4, 58 Stat. 887, 889, for the proposition that at the time of the Benbrook Project, "it was already the established federal policy that recreational facilities be provided along with federally-constructed reservoirs" (p. 6).

Petitioners alluded to this Act in their Petition (p. 20 n. 34) but did not deal with it in detail because it seemed obvious that the Act did not establish any such federal policy as now claimed by the Government. In view of the Government's reliance on the Act, a few supplemental comments are in order.

1. The Committee Report cited in our Petition (p. 20 n. 34) affirmatively shows that the 1944 Act applied *only* to 42 dam and reservoir projects already owned by the Government. It therefore did not and could not apply to the Benbrook Project.

2. Section 4 of the 1944 Act granted the Corps of Engineers authority to construct, maintain and operate public park and recreational facilities only "in reservoir areas under the control of the War Department". The Benbrook Project was not "under the control of the War Department" in 1944.

3. Public Law 525 was enacted on the same day as Public Law 526, and yet one contained provisions for recreation and the other did not, showing Congress' clear intent to approve recreation only when specifically authorized. Public Law 14, which approved the Benbrook Project, contained no such authorization for recreation.

4. Subsequent Acts authorizing various projects specifically adopted certain provisions of Public Law 534. As only one example, Public Law 858 (1948) states that "The provisions of Section 1 of the Act of December 22, 1944 (Public, Numbered 534, 78th Congress, 2nd Session) shall govern with respects to projects authorized in this title * * *". The incorporation by *express* reference of one provision of Public Law 534 negates the implied incorporation of any other provision of Public Law 534, including the one in Section 4 relating to recreation.

For each and all of these reasons, it is obvious that the 1944 Act alluded to by the Government simply is not relevant to the present inquiry.

The Government's argument in regard to the changes in the Benbrook Project overlooks an extremely important point. The Project was authorized by Public Law 14, in accordance with House Doc. 403, which allowed 30,000 feet of conservation storage. Without returning to Congress for approval, the Corps more than doubled the 30,000 feet to 72,000 feet. Another project, the Lavon Reservoir, was also authorized by Public Law 14, in accordance with House Doc. 533, which also allowed for conservation storage. Yet when the Corps sought to change the Lavon storage capacity, it felt compelled to return to Congress and obtain specific authorization in Section 2 of Public Law 525 (1946) for the Project to be "modified to provide for conservation storage as may be determined warranted by the Secretary of War upon the recommendations of the Chief of Engineers." Why the Corps would feel compelled to return to Congress in one instance and not in the other has not been and cannot be explained by the Government. The simple fact is that the many and substantial changes in the Benbrook Project were unauthorized in a situation clearly calling for prior authorization.

In conclusion, we should note that if the Court of Appeals theory now espoused by the Government is adopted—that so long as the completed project is somehow "associated with" the project sanctioned by Congress, no court can look behind it—there is literally no judicial review left for condemnations effected by the Corps of Engineers. We cannot believe that this Court, in *Berman* v. *Parker* or in any other case, ever meant to imply that since the project approved by Congress was a dam and reservoir in Texas, and since the completed project was "associated with" a dam and reser-

voir in Texas, the courts have no jurisdiction to test the taking.

It is noteworthy that the Government, like the Court of Appeals, does not challenge in any way the District Court's finding that the long-concealed purpose of the taking was for recreational purposes. The Government, like the Court of Appeals, has no explanation as to why, if it was "already the established federal policy" to provide recreational facilities along with federally constructed reservoirs, the Corps of Engineers fought so assiduously for so long to prevent anyone from learning about the recreational purpose behind the taking. If the recreational policy was so well established, why was the field practice of taking more property than needed so as to provide recreation specifically changed by the Secretary of the Army once the facts of this case came to light, and why did the head of the Corps of Engineers concede to a congressional committee that there was no authority for recreational taking? The Government suggests no answers and, we think, for obvious reasons.

Respectfully submitted,

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